

WONG CHOR SAN v. CHOP YEE KUAN

[A. C. J. (Thomson J.) May 2, 1956]

[Ipoh — Civil Appeal No. 31 of 1955]

Landlord and Tenant — Prohibition against subletting — Waiver — Control of Rent Ordinance, 1948, s. 14(1).

In this case the premises were let in October 1951 to one Choong Sek Choon on the condition that the premises were not to be sublet or assigned. In March 1954 the landlord observed that an additional signboard bearing the name "Yee Kuan" had been erected on the premises. Application was made to the Registrar of Business Names for particulars of Chop Yee Kuan and these were sent by the Registrar by letter on the 1st November 1954. The landlord said he did not receive this letter till 12th or 13th November. On 9th November 1954 the landlord accepted rent from Choong Sek Choon. The landlord claimed possession of the premises and the learned President granted ejectment against Choong Sek Choon but refused to grant it as against the defendants who were sued under the name "Yee Kuan".

Held: (1) the question whether the defendants were entitled to remain on the premises depended on whether the original prohibition against subletting had been waived by the acceptance of the rent;

(2) the learned President had not come to any finding of fact on this point and therefore there must be a retrial.

Cases referred to:—

- (1) *Lace v. Chantler* (1944) 1 K.B. 368.
- (2) *Norman v. Simpson* (1946) 1 K.B. 158.
- (3) *Maley v. Fearn* (1947) 116 L.J.R. 276, 278.
- (4) *Matthews v. Smallwood* (1910) 1 Ch. 777, 786.

CIVIL APPEAL.

S. K. Das for the appellant.

S. M. Sharma for the respondent.

Thomson J.: — This is an appeal from the Sessions Court at Ipoh.

The appellant was and is the tenant of premises at No. 13 Leech Street, Ipoh, and on 11th October, 1951, he entered into an agreement regarding a portion of these premises which I shall call "the shop" with one Choong Sek Choon. That agreement was reduced to writing in Chinese characters and I do not think any useful purpose would be served by a detailed exegesis of the English translation which was put in evidence. Under this agreement the appellant purported to let the shop to Choong Sek Choon for the purposes of the latter's crockery business. On the face of the agreement the letting would appear to be expressed as being for so long as Choong Sek Choon should carry on that business and that being a term which was uncertain at the time of the agreement, no good leasehold interest was thereby created (See *Lace v. Chantler*⁽¹⁾). All the parties to the present proceedings, however, seem to have been agreed that it should be construed as an

agreement for a monthly tenancy subject to the conditions, *inter alia*, that Choong Sek Choon should use the premises for the purpose of his crockery business only and that he should not "rent out, assign or loan" the premises without the consent of the appellant.

On completion of that agreement Choong Sek Choon went into occupation of the shop and proceeded to carry on his crockery business there and to pay rent. The name under which he carried on business and which appeared on his signboard was "Hoong Toong Chan", although it is to be noted that when this particular business was registered in accordance with the Registration of Businesses Ordinance it was stated that the sole proprietor was Choong Hoon Toon who would appear to be Choong Sek Choon's father.

In March, 1954, the appellant observed that hardware was being brought on to the premises in addition to crockery and that an additional signboard had been erected bearing the name of "Yee Kuan" and he had a conversation with Choong Sek Choon the nature of which formed the subject of acute controversy at the trial. The same day, 19th March, 1954, he wrote to the Registrar of Businesses asking for a copy of the Form of Registration of the business known as "Chop Yee Kuan & Co." at No 13 Leech Street, Ipoh. On 24th March the Registrar of Businesses replied stating that the business in question did not seem to have been registered but "an enquiry has today been sent to the above to ensure that the provisions of the Ordinance are complied with. Your request will be dealt with as soon as the information is available." I pause here to observe that had the Registrar kept his promise to deal with the appellant's request as soon as the information in question was available the Courts would probably not have been troubled with the present litigation, at least not in its present form. Presumably, however, the Registrar did write to Chop Yee Kuan for on 30th April a notice of registration was filed shewing that with effect from 25th March, 1954, one Tan Chor Kuan and one Teh Hin Cheun had commenced business in partnership trading in building materials at No. 13 Leech Street, Ipoh.

In the meantime on 26th March the appellant wrote a letter to Choong Sek Choon which referred to the agreement dated 11th October, 1951. No specific breach of that agreement was mentioned but the letter stated: "You are hereby requested to comply strictly with each and every condition as provided under the aforesaid agreement otherwise I shall be obliged to resort to legal action." That letter elicited an almost immediate reply dated 30th March from Choong Sek Choon's solicitors. It is unnecessary to quote that letter at length but, although there is nothing on the

face of the appellant's letter to justify such an interpretation, it clearly treats that letter as a complaint that Choong Sek Choon was dealing in hardware on the premises in contravention of his agreement, for it states: "Our client has advised us, that before adding an extra line to his business at the premises, he obtained your full consent."

Then on 5th April the appellant wrote again to the Registrar of Businesses enquiring in effect as to whether there had been any change of partners in connection with the business registered as Chop Hoong Toong Chan and in reply he was informed that there had been no change and that the only person registered as carrying on that business was Choong Hoon Toon who was registered as having commenced to trade under that name on 1st January, 1952.

The appellant did nothing more until October, 1954. During that month he did not see Choong Sek Choon at the shop, there were changes in the other people attending at the shop and there were movements of stock. This apparently aroused his suspicions and he again wrote on 27th October, 1954, to the Registrar of Businesses enquiring as to the business known as Chop Yee Kuan. In reply he was given the information which the Registrar had promised on 24th March to supply and which he could have supplied shortly after 30th April, that Chop Yee Kuan was the business name under which Tan Chor Kuan and Teh Hin Cheun were carrying on business in building materials at No. 13 Leech Street, Ipoh, as from 25th March, 1954, and that this business had been registered on 30th April, 1954.

This letter from the Registrar of Businesses was dated 1st November, 1954. The appellant said he did not receive it until 12th or 13th November. This statement is not very easy to believe but unfortunately the learned President has recorded no finding of fact on the point which acquires very great significance from the fact that on 9th November the appellant accepted rent from Choong Sek Choon.

On 27th November, 1954, the appellant's solicitors wrote a letter to Choong Sek Choon terminating his tenancy as at 31st December, 1954. That letter rather curiously did not make any reference to Choong Sek Choon's action in selling hardware on the premises but stated that he had violated a clause of his agreement by assigning or sub-letting the premises to Chop Yee Kuan "a firm carrying on hardware business." It is not necessary to consider here the effect of that letter because in his Statement of Claim (paragraph 8) the appellant alleges that by it he "duly determined the tenancy of defendant No. 1 on the 31st day of December, 1954" and by paragraph 8 of the Defence that is admitted.

In due course, the appellant obtained the permission of the Rent Assessment Board to apply for ejectment of Choong Sek Choon from the premises and on 22nd June, 1955, he commenced ejectment proceedings against Choong Sek Choon on the grounds that his tenancy had been determined and that he was no longer in occupation of the premises and as against Tan Chor Kuan and Teh Hin Cheun, who were sued in the firm name of Yee Kuan, on the ground that they were persons in unlawful occupation. The case came on for trial in the Sessions Court and in the event the learned President granted ejectment as against Choong Sek Choon but refused to grant it as against the two defendants who were sued under the name of Yee Kuan. Against that judgment, so far as it concerns Choong Sek Choon, there has been no appeal but against so much of it as concerns the other defendants, the appellant has now appealed.

The learned President has dealt with the matter in a long and careful judgment the greater part of which I am not called upon to consider here for most of it concerns the position of Choong Sek Choon who has not appealed.

What I am concerned with here is the position of Tan Chor Kuan and Teh Hin Cheun.

It is clear that some time in March, 1954, certain persons entered into a partnership agreement, which was probably not in writing and the whole terms of which cannot be deduced from the evidence, to carry on the business of dealing in hardware under the name of Chop Yee Kuan in the shop at No. 13 Leech Street, Ipoh. I see no reason to differ from the conclusion of the learned President that whatever happened subsequently these persons were Tan Chor Kuan and Teh Hin Cheun only and did not include Choong Sek Choon. At some time, too, it is clear that Choong Sek Choon purported to sub-let the shop to these persons as sub-tenants. It is not clear, however, whether originally they came into occupation of the shop as sub-tenants or as licencees because for some time after they had come into occupation and set up their sign-board Choong Sek Choon continued to carry on his own business under the name of Hoong Toong Chan on the same premises. Nevertheless, from March, 1954, the Yee Kuan partners commenced to pay rent to Choong Sek Choon at the rate of \$80 per month, which was the same rent that he was paying to the appellant. And, some time in October Choong Sek Choon on the appellant's own evidence ceased to occupy the shop although he continued to receive rent from the Yee Kuan partners and on at least one occasion paid rent to the appellant.

Now, in considering the position of the Yee Kuan partners I do not think there is any room for doubt that the learned President misdirected himself. Having held that the appellant was entitled to ejectment as against Choong Sek Choon, a decision which has not been questioned, he went on to observe "I do not think it would be equitable or reasonable to order eviction of defendant No. 2 the partner." He went on to give reasons for taking that view with which I for one would not feel disposed to quarrel. But, however, well-founded that view was it amounted to a misdirection.

There was no question of relief against forfeiture or anything of that sort. Putting aside for the moment the question of the effect of the Control of Rent Ordinance, the position was that the Yee Kuan partners derived such rights to be in possession as they might have from Choong Sek Choon and from him only. No sub-tenancy which derived from him could subsist beyond the end of his own tenancy and it was admitted that his tenancy had come to an end on 31st December, 1954. When his tenancy came to an end the partners' sub-tenancy, even assuming that it had originally been lawful, came to an end also and if the partners remained in possession thereafter they were trespassers. In the circumstances the appellant was entitled to ejectment as against them *ex debito justitiae* and there was no room for the exercise of any sort of discretion.

If the Yee Kuan partners had any right to occupy the premises after the determination of Choong Sek Choon's tenancy it could only be by reason of section 14(1) of the Control of Rent Ordinance the material portion of which reads as follows:—

"No judgment or order for recovery of possession shall be enforced as against sub-tenants (if any) of the tenant of the premises where the tenant was not prohibited from sub-letting by the terms of his tenancy."

What the learned President had to decide was whether or not the partners had brought themselves within the protection of that section. If they had they were entitled to remain in occupation as statutory tenants; if they had not the appellant was entitled to have them ejected and there was no question of discretion or of whether such a course was equitable or reasonable.

This misdirection would not in itself be necessarily fatal but unfortunately on a perusal of the evidence and of the judgment I find it very difficult to form any opinion as to what would have been the learned President's answer to the question he had to decide had he formulated it correctly.

I can see no material distinction between section 14(1) of our Ordinance and section 15(3) of the English Act of 1920 which protects "any sub-tenancy to whom the premises . . . have been lawfully sub-let". In the case of *Norman v. Simpson*⁽²⁾ it was held under section 15(3) of the English Act that the question

of whether premises "have been" lawfully sub-let is to be determined with reference to the time immediately before the head tenancy came to an end. Applying that decision to the interpretation of section 14(1) of the Ordinance the question to be decided in the present case was whether Choong Sek Choon was prohibited from sub-letting by the terms of his tenancy not in March or October, 1954, but immediately prior to 31st December, 1954, which was the date on which it is admitted his tenancy came to an end.

Now I think it is common ground (if it is not common ground I agree with the learned President in so holding) that Choong Sek Choon was prohibited from sub-letting without consent by the terms of the original agreement of 11th October, 1951. It has to be considered, however, whether there had been waiver of that prohibition on the part of the appellant by reason of his having knowledge of the sub-letting when he accepted rent from Choong Sek Choon on 9th November, 1954. If there was such a waiver, then immediately before 31st December, 1954, Choong Sek Choon was not prohibited from sub-letting by the terms of his tenancy. In that connection I would quote the following passage from the judgment of Somervell L.J. in the case of *Maley v. Fearn*⁽³⁾:—

The case of *Norman v. Simpson* was one in which there was originally a sub-letting without consent, the lease providing that there should be no sub-letting without the consent of the landlord. Subsequently the landlord accepted rent from the tenant with knowledge of the sub-lease, and the court held that in those circumstances at the material date (which was held to be the date immediately before the head tenancy came to an end) the sub-lessee was not an unlawful tenant within the meaning of the Rent Restriction Acts. Therefore the question as to the position when the sub-lease was originally made without the consent of the landlord did not arise for decision."

Now it is true that the learned President discussed this question of waiver at some considerable length in connection with the case against Choong Sek Choon and came to certain conclusions regarding it. I am not at all sure, however, that he would have come to the same conclusions had he been discussing it in relation to the application of section 14(1) to the case of the Yee Kuan partners.

Waiver is a somewhat loose expression and may imply either something in the nature of estoppel or something in the nature of an agreement to vary the terms of a contract. It is not necessary to discuss the point at length here. Nor is it necessary for the purposes of the present case to discuss the distinction between what constitutes a continuing breach of a covenant in a lease such as wrongful user of the premises and a non-continuing breach such as unauthorised sub-letting. The real point here is that there can be no waiver without knowledge and that knowledge must be knowledge of the true nature of the breach that is being waived.

What is in question here is whether there was waiver of a term of a contractual tenancy. Nevertheless, I think the following passage from the judgment of Parker J. in the case of *Matthews v. Smallwood*⁽⁴⁾ regarding the waiver of a right of re-entry under a lease is very much in point :—

“Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease. It is not enough that he should do the act which recognizes, or appears to recognize, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose. Therefore we get the principle that, though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches which were unknown to the lessor at the time when the act took place.”

Where a landlord has reason to believe or has been led to believe that his tenant in breach of a condition has sub-let to A, a man of substance, the waiver of that breach will not be effective if in point of fact the breach consisted in sub-letting to B, a man of straw. Again, if a landlord is under the impression that a party has come into occupation of his premises as a licensee that will not amount to waiver of the breach which would have been committed had the party in question in fact come into occupation as a sub-tenant. Obviously a landlord might well be disinterested in the presence on the premises of a licensee whereas he might well take the strongest objection, if he knew about it, to the presence of a party who was acquiring rights under the Control of Rent Ordinance.

In the present case, I do not think it can be said that in March, at any rate, the appellant had any reason to believe that the Yee Kuan partners even if he knew they were carrying on business in the shop were not doing so as bare licensees. Choong Sek Choon's business was still being carried on on the premises and to judge from the photograph which is in evidence his signboard was much more prominent than that of Yee Kuan. There was certainly nothing to shew that Yee Kuan had exclusive possession of the premises at that stage and without exclusive possession there could be no question of tenancy. Later on, however, the position may well have changed. In October the appellant says that Choong Sek Choon absented himself from the premises, although it is not suggested that his signboard was removed. That, in the light of the previous events, was grounds for thinking that whoever remained in occupation did so as a sub-tenant and not as a licensee. And when on top of that he learned from the Registrar of Businesses' communication of 1st November that Yee Kuan was the business name not of Choong Sek Choon but of two other persons grounds for thought became grounds for certainty that there had been a sub-letting to the two persons named so as to make it

difficult to avoid the inference that he then had knowledge of what had happened. If he was in that state of having knowledge before he accepted rent on 9th November then there was waiver on his part. If he did not have that knowledge till after 9th November there was no waiver. On that point, however, as I have said, the learned President has come to no finding of fact. In the circumstances, I see no alternative to ordering a new trial as between the appellant and the Yee Kuan partners.

The cost of this appeal will abide the event of that new trial.

I would add that I have not considered the effect of any breach of the terms of the original agreement by the Yee Kuan partners after 31st December, 1954. The question of whether they then became statutory tenants will depend on the outcome of the new trial. If they are not statutory tenants the point will not arise. If they are statutory tenants there will have to be further proceedings for it will then be necessary to have the permission of the Rent Assessment Board before asking for their ejectment.

New trial ordered.

Solicitors : *Das & Co.; S. M. Sharma.*

LIM TECK SENG v. REG.

[A. Cr. J. (Rigby J.) July 6, 1956]

[Penang — Criminal Appeal No. 40 of 1954]

Criminal Procedure Code (S.S. Cap. 21) s. 182(h)
— *Substitution of a more serious charge at the end of the case — Motor Vehicles (Driving Offences) Proclamation, ss. 4(2) and 5.*

In this case the appellant was charged with inconsiderate driving, contrary to section 5 of the Motor Vehicles (Driving Offences) Proclamation. At the close of the case and after the defence had been concluded the learned President substituted a charge of negligent driving contrary to section 4(2) of the Proclamation.

Held: the substitution of the more serious charge at the end of the case was in the circumstances unjust and therefore the conviction must be altered to one under section 5 of the Motor Vehicles (Driving Offences) Proclamation of driving without reasonable consideration.

Case referred to :—

- (1) *Public Prosecutor v. Salamah binti Abdullal*
(1947) M.L.J. 178.

MAGISTRATE'S CRIMINAL APPEAL.

Lee Thean-Chu for the appellant.

F. G. Cooke (Federal Counsel) for the respondent.

Rigby J. :—The appellant in this case was originally charged before the learned President, sitting as Magistrate, on a charge of inconsiderate driving, contrary to section 5 of the Motor Vehicles (Driving Offences) Proclamation. Mr. Lee Thean-Chu, who